TETUAN TAN TENG SIAH REALTY SDN BHD

v.

ISLAND OIL PALM PLANTATIONS SDN BHD & ANOR

HIGH COURT MALAYA, PULAU PINANG
JEFFREY TAN J
[CIVIL SUIT NO: 22-339-93]
28 OCTOBER 1996

CIVIL PROCEDURE: *Default judgment - Setting aside - Whether there was defence on merit - Whether judgment regular or irregular - Whether judgment should be set aside as of right*

The plaintiff had obtained a judgment in default of appearance against the defendants. The judgment sum was for RM608,975.69 and the defendants applied to the registrar to have the judgment set aside on the ground that the judgment entered was for a sum in excess of the amount owing. The plaintiff had paid out a sum of RM750,000 to the chargee bank to avoid the public auction of certain charged lots of land. The sum of RM600,000 was paid to the defendants' overdraft account and RM150,000 was pledged to the chargee bank which had later returned to the plaintiff a sum of RM141,024.31. Thus the amount suffered by the plaintiff was the judgment sum. The defendants argued that there were three payments that were made to the chargee bank which were not credited and they submitted that the judgment should be set aside as there was a defence on the merits.

Held:

[1] A judgment entered in default is not a judgment decided on merits and is liable to be set aside pursuant to O. 13 r. 8 of the Rules of the High Court 1980 ('the RHC'). Where the judgment is regular there must be shown a defence on the merits and where the judgment is irregular it can be set aside as a matter of right.

[2] Irregularities that render a judgment a nullity include the failure to serve the summons, the service not provided for by law, the failure to mention the mode of service in the application for substituted service, the plaintiff getting more than what is prayed for, the default judgment obtained prematurely or for a sum more than that allowed by O. 42 r. 12 of the RHC, and the judgment entered without leave when leave is required.

[2a] The default judgment in the instant case was not afflicted by any of the irregularities which could render the judgment a nullity. The judgment sum was less than the sum prayed for but this did not make

the default judgment void or voidable. A judgment for a lesser sum will not occasion a failure of natural justice, as there will be no requirement to amend the sum prayed for. The judgment thus regularly obtained could not be cast aside as of right. There must be a defence on the merits which meant that the defendants must raise an arguable or triable issue.

[3] A defence has merits if there is reasonable prospect of success on the grounds stated and evidence placed before the court. The defence that there were three payments not credited could not constitute an arguable case as there were documents that proved otherwise and it could not be disputed that the plaintiff had suffered a loss of RM608,975.69 which was the judgment sum. Consequently there was no defence on the merit.

[3] There were no facts which made it reasonable that the defendant should be allowed the stated defence. Accordingly, the order setting aside the default judgment was set aside and the default judgment was thereby restored.

[Appeal allowed; default judgment restored.]

Per Curiam

[1] An appeal to a judge in chambers from the decision of a registrar of the High Court is an actual rehearing and the judge treats the matter as though it comes before him for the first time.

[2] When the plaintiff appealed against the registrar's order for setting aside the judgment in default, it was in effect the defendant's application to set aside the default judgment.

Cases referred to:

Tuan Haji Abdul Rahman v. Arab Malaysian Finance Berhad [1996] 1 CLJ 241 ***(refd)***
Seloga Jaya Sdn Bhd v. Pembinaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 ***(cit)***
L Oppenheim & Co v. Mohamed Heneef [1922] 1 AC 482 ***(cit)***
Re Udos ak Riging; ex parte Seabanc Kredit Sdn Bhd [1994] 3 MLJ 383 ***(aff)***
Evans v. Bartlam [1937] AC 473 ***(refd)***
Bank Bumiputra Malaysia Berhad v. Majlis Amanah Ra'ayat [1979] 1 MLJ 23 ***(refd)***
Craig v. Kanseen [1943] 1 All ER 108 ***(refd)***
United Overseas Bank Ltd v. Chung Khiaw Bank Ltd [1968] 2 MLJ 85 ***(refd)***
PT Pelajaran Nasional Indonesia v. Joo Seang & Co Ltd [1958] 24 MLJ 113 ***(refd)***
Arab Malaysian Credit Berhad v. Prinwell (M) Sdn Bhd [1993] 4 CLJ 48 ***(refd)***
Cheow Chew Khoon & Teoh Chew Khoon (t/a Cathay Hotel) v. Abdul Johori b. Abdul Rahman [1995] 4 CLJ 127 ***(cit)***
Tan Tin Swee v. Kangar Properties Sdn Bhd [1990] 2 CLJ 457 ***(cit)***

Development & Commercial Bank Bhd v. Aspatra Corp Sdn Bhd & Anor & Another Appeal [1996] 1 CLJ 141 ***(cit)***

United Malayan Banking Corp Bhd v. Mideast Development Sdn Bhd & Ors [1990] 2 CLJ 867 ***(cit)***

Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 ***(refd)***

Fira Development Sdn Bhd v. Goldwin Sdn Bhd [1989] 1 MLJ 40 ***(refd)***

Siong Hong (Kodiang) Sdn Bhd v. Pembinaan Ng Sheng Kwee Sdn Bhd & 6 Ors [1988] 1 MLJ 357 ***(refd)***

John Wallingford v. Mutual Society [1880] 5 App Cas 685 ***(refd)***

Hong Leong Finance Ltd v. Tay Keow Neo & Anor [1992] 1 SLR 205 ***(refd)***

Alpine Bulk Transport Co Inc v. Saudi Eagle Shipping Co Inc; the Saudi Eagle [1986] 2 Llyod's Rep 221 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 13 r. 8, O. 19 r. 9, O. 42 r. 12

For the plaintiff - Tung Mun Yeong; M/s Tan Ewe & Assoc

For the defendants - Harjit Singh Sangay; M/s Harjit Singh Sangay & Co

JUDGMENT

Jeffrey Tan J:

On 16 June 1995, both defendants were ordered, by a judgment in default of their appearance, to pay the plaintiff the sum of RM608,975.69 and costs. This is the plaintiff's appeal (end. 19), to judge in chambers, against the order of the learned senior assistant registrar, of 13 September 1996, setting aside that judgment in default.

An appeal to a judge in chambers from the decision of a registrar of the High Court is an actual rehearing and the judge treats the matter as though it comes before him for the first time (*Tuan Haji Abdul Rahman v. Arab-Malaysian Finance Berhad* [1996] 1 CLJ 241, per Edgar Joseph Jr FCJ; see also *Seloga Jaya Sdn. Bhd. v. Pembinaan Keng Ting (Sabah) Sdn. Bhd.* [1994] 2 CLJ 716); it works out, therefore, that the plaintiff's appeal is, in effect, the defendants' application to set aside the judgment in default of appearance.

A judgment entered in default is not a judgment decided on merits (*L Oppenheim & Co v. Mohamed Heneef* [1922] 1 AC 482) and is liable, as it does not finally dispose off the rights of the parties, to be set aside (*Re: Udos ak Riging; ex parte Seabanc Kredit Sdn. Bhd.* [1994] 3 MLJ 383).

As Lord Atkin, in *Evans v. Bartlam* [1937] AC 473 at 480, observed:

> The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive powers where that has been obtained by a failure to follow any of the rules of procedure.

Indeed, O. 13 r. 8 of the Rules of the High Court 1950, which is in *pari materia* with O. 19 r. 9, provides, "the court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order."

"As a general rule, where (a) judgment is irregular ... (it) will be cast aside, as a matter of right *(ex debito justitiae)*" (see Janab's Key to *Civil Procedure in Malaysia and Singapore* (2nd edn) p. 314). Where the judgment is regular, "it is axiomatic ... that there must be an affidavit of merits, that is, an affidavit stating facts showing a defence on the merits": *Bank Bumiputra Malaysia Berhad v. Majlis Amanah Ra'ayat* [1979] 1 MLJ 23, per Raja Azlan Shah (as HRH then was)

It was asserted, in the 2nd defendant's affidavit of 1 December 1995, but not in the submission of learned counsel, that the default judgment was an irregular judgment.

The plaintiff's claim against both defendants was for a liquidated sum. The statement of claim dated 9 September 1993 asserted the following. Sometime in 1986, the plaintiff charged its lands (lots 1065 & 1462 Section 4 North East District, Georgetown) (said lots), at the requests of the defendants, to the Chung Khiaw Bank Limited (chargee bank), as security to the chargee bank for loan facilities of RM500,000 to the 1st defendant. Sometime in 1989, the plaintiffs demanded of the 1st defendant to settle the said loan and to obtain a discharge of the said lots. The defendants requested the plaintiff to withhold all intended proceedings against the 1st defendant for the repayment of all monies due to the chargee bank. By a deed of forbearance and indemnity dated 16 January 1989, the plaintiff agreed to withhold proceedings against the 1st defendant, and the defendants agreed, in consideration of the plaintiff's forbearance, to indemnify the plaintiff "against all loss(es) damage actions claims or demands howsoever arising in the event that the 1st defendant (should) fail to repay all monies due the Chung Khiaw Bank Limited and in consequence thereof the said (lots) (are) foreclosed and forfeited." The 1st defendant failed to repay the said loan, and the chargee bank demanded the sum of RM674,369.35 and the interests accruing thereon from the plaintiff. The interest accruing was calculated at the rate of 4.5% above the base lending rate. The amount outstanding was RM720,000, or thereabout.

There is no statement of defence. However, the 2nd defendant deposed, on behalf of both defendants, in affidavits affirmed on 1 December 1995 and 22 January 1996, as follows. He learned that a judgment was entered against the defendants, on 16 June 1995, for the sum of RM608,975.69. The judgment sum was not correct as there were three payments (RM25,000 on 9 February 1995, RM117,000 on 9 February 1995 and RM55,000 on 13 February 1995) to the chargee bank. The amount claimed was for RM720,000 but judgment

was entered in the sum of RM608,975.69. There was no application to amend the statement of claim. The judgment was irregular and has no legal effect. The three payments totaling RM197,000 were not credited. Judgment was entered for a sum in excess of the amount owing. The judgment should be set aside *ex debito justitiae*. There is a defence on merits. The defendants should be given a chance to defend the action.

One Tan Chin Nam, a director of the plaintiff, presented a different set of facts. He affirmed the facts asserted in the statement of claim and deposed furthermore, in encl. 14, to the following. The plaintiff paid a total sum of RM750,000 to the chargee bank to avoid the public auction of the said lots. Of that RM750,000, a sum of RM600,000 was credited into the 1st defendant's overdraft account. The balance RM150,000 was pledged to the chargee bank, by way of a fixed deposit, as the agreed security for the remaining sum outstanding to the chargee bank. On 11 April 1995, the chargee bank returned a sum of RM141,024.31 to the plaintiff. Accordingly, the plaintiff suffered a loss of RM608,975.69, that is, the judgment sum entered against the defendants. All sums paid into the 1st defendant's overdraft account (including the three payments totaling RM197,000) were taken into account.

The defendants asserted the judgment should be set aside as of right, *ex debito justitiae.* What judgments could be set aside *ex debito justitiae*?

His Lordship, Edgar Joseph Jr FCJ, in *Tuan Haji Ahmad Abdul Rahman v. Arab-Malaysian Finance Berhad* [1996] 1 CLJ 241, observed as follows:

> The case of *Marsh v. Marsh* [1945] AC 271 at 284 PC shows that there is no decisive test for ascertaining what irregularities will result in a judgment being rendered void as distinct from voidable, though it was there suggested by Lord Goddard when speaking for the Board that one test which may applied is whether the irregularity has caused a failure of natural justice. That is how His Lordship put it (at p. 284):
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> > A considerable number of cases were cited to their Lordships on the question as to what irregularities will render a judgment or order void or only voidable. *Anlaby v. Praetorius* 20 QBD 764 and *Smurthwaite v. Hannay* [1894] AC 494 are leading examples of the former, while *Fry v. Moore* 23 QBD 395 may be said to illustrate the latter. The practical difference between the two is that if the order is void the party whom it purports to affect can ignore it, and he who has obtained it will proceed thereon at his peril, while if it be voidable only the party affected must get it set aside. No court has ever attempted to lay down a decisive test for distinguishing between the two classes of irregularities, nor will their Lordships attempt to do so here, beyond saying that one test that may be applied is to inquire whether the irregularity has caused a failure of natural justice.

However, in *Wiseman v. Wiseman* [1953] 1 All ER 601, Denning LJ (as he then was) criticised the above *dictum* of Lord Goddard, in our view with considerable justification, when he said:

> It has been said that one test of the distinction between void and voidable is to inquire whether the transaction has caused a failure of natural justice; see *Marsh v. Marsh*, but I confess that I cannot follow this. If the defect is such as to make the transaction absolutely void, then void it is, no matter whether it causes a failure of natural justice or not. But if the effect of the defect is only to make the transaction voidable, then natural justice may well be taken into account by the court in deciding whether it will in its discretion set the transaction aside or not, but it does not make the transaction automatically void.

> Having said that there are some general observations which we should like to make regarding judgments which have not been regularly obtained. It has been said that a judgment would not be regularly obtained if it has been entered contrary to the rules, as for example ...

Lord Greene, MR, in *Craig v. Kanseen* [1943] 1 All ER 108, pronounced that an order "which can be described as a nullity is something which the person affected by it is entitled *ex debito justitiae* to have set aside." In a similar vein, it was held by the Singapore Court of Appeal, in *United Overseas Bank Ltd. v. Chung Khiaw Bank Ltd.* [1968] 2 MLJ 85, that an order obtained on a summons not served on an essential party "is a nullity and the appellants who are affected by it are entitled *ex debito justitiae* to set it aside."

The following were held as irregularities that rendered the judgment a nullity;

(a) the failure to serve the summons, apart from proper *ex parte* proceedings, upon which the order was based (*Craig v. Kanseen (supra)*; *United Overseas Bank Ltd. v. Chung Khiaw Bank Ltd. (supra)*),

(b) service not provided by law (see *P.T. Pelajaran Nasional Indonesia v. Joo Seang & Co. Ltd.* [1958] 24 MLJ 113, when Rigby J held, on the compliance of the method or form or procedure for effecting service as provided by law, that a court would set aside a judgment obtained by default where the requirements had not been complied with, and that all proceedings thereafter, including the judgment, was a nullity),

(c) failure to mention the mode of service, in the application for substituted service (see *Arab Malaysian Credit Berhad v. Prinwell (M) Sdn. Bhd.* [1993] 2 AMR 1909, where Shaik Daud J (as he then was) opined, "where proceedings are taken in the absence of one party it

is most important that there should be strict compliance with the rules"),

(d) a default judgment different from the prayers in the statement of claim such that the plaintiff is getting more than what he prayed (*Cheow Chew Khoon @ Teoh Chew Khoon (t/a Cathay Hotel) v. Abdul Johari b. Abdul Rahman* [1995] 4 CLJ 127),

(e) a default judgment obtained prematurely (see *Tan Tin Swee v. Kangar Properties Sdn. Bhd.* [1990] 2 CLJ 457),

(f) a default judgment for a larger sum than that allowed by O. 42 r. 12 of the RHC 1980, with regard to the interest from the date of judgment (*Development & Commercial Bank Bhd. v. Aspatra Corp Sdn. Bhd & Anor and Another Appeal* [1996] 1 CLJ 141; *United Malayan Banking Corp. Bhd. v. Mideast Development Sdn. Bhd. & Ors.* [1991] 1 MLJ 55; (contrast with *Khor Cheng Wah v. Sungai Way Leasing Sdn. Bhd.* [1997] 1 CLJ 396, where the Court of Appeal held that a judgment that is entered for too much is a mere irregularity),

(g) and it should be added, though it is hardly the last irregularity, a judgment entered without leave where leave is required *(Syarikat Joo Seng & Anor v. Habib Bank Ltd. (supra)).*

Evidently, the default judgment, in the instant case, was not afflicted by any of the aforesaid irregularities. The defendants alleged that the judgment sum was less than the sum prayed; but that did not render the default judgment void or voidable, as the plaintiff entering judgment for a lesser sum than the sum prayed was not required, since a judgment for a lesser sum would not occasion a failure of natural justice, to amend, the sum prayed. The default judgment, and it was regularly obtained, cannot be cast aside as of right. There must be a defence on the merits.

In *Fira Development Sdn. Bhd. v. Goldwin Sdn. Bhd.* [1989] 1 MLJ 40, the Supreme Court, per Lee Hun Hoe CJ (Borneo), pronounced, "a defence on the merits means merely raising only an arguable or triable issue."

Lim Beng Choon J, in *Sing Hong (Kodiang) Sdn. Bhd. v. Pembinaan Ng Sheng Kwee Sdn. Bhd. & 6 Ors* [1988] 1 MLJ 357 at 358, thus explained a defence on the merits:

> No doubt O. 13 r. 8 of the Rules of the High Court 1980 gives an unfettered discretion to the court to set aside a judgment entered in default of appearance. However, the Court's discretion under that rule must be exercised in accordance with the settled principle that of the judgment is a regular ... then it is an

> inflexible rule that there must be an affidavit of merits stating facts which can satisfy the court that the defendant has a reasonable defence on the merits (see *Bank Bumiputra Bhd v. Majlis Amanah Rakyat* [1979] 1 MLJ 23 @ 240, and 'defence on merits' as explained by Sir John Megaw in *Tong Lee Hua v. Yong Koh Chin* [1981] 2 MLJ 1 @ 2 mean a defence in which there appears 'to be an arguable issue' or as Lord Denning MR put it in *Burns v. Kondel* [1971] 1 Lloyd's Law Reports 554 2 555, explains the phrase to mean 'a defence which discloses an arguable and triable issue.'

Lord Blackburn, in *John Wallingford v. Mutual Society* [1880] 5 App Cas 685 at 704, thus emphasized the importance of an affidavit stating facts which can satisfy the court that there is reasonable ground for the stated defence:

> I think that when the affidavits are brought forward to raise that defence they must, if I may use the expression, condescend upon particulars. It is not enough to swear, 'I owe the man nothing'. Doubtless, if it was true, that you owed the man nothing, as you swear, that would be a good defence. But that is not enough. You must satisfy the judge that there is reasonable ground for saying so. So again, if you swear that there was fraud, that will not do. It is difficult to define it, but you must give such an extent of definite facts pointing to the fraud as to satisfy the judge that those are facts which make it reasonable that you should be allowed to raise the defence.

Rubin JC, in *Hong Leong Finance Ltd v. Tay Keow Neo & Anor* [1992] 1 SLR 205, citing *Alpine Bulk Transport Co. Inc v. Saudi Eagle Shipping Co. Inc; the Saudi Eagle* [1986] 2 Lloyd's Rep 221, held that a defence has merits if there is a reasonable prospect of success on the grounds stated and evidence placed before the court.

And what is the "defence" in the instant case? The 2nd defendant contended that the judgment sum was incorrect, in that it was in excess of the amount owing, because three payments (RM25,000 on 9 February 1995, RM117,000 on 9 February 1995 and RM55,000 on 13 February 1995) were not taken into account. However, he failed to appreciate he was disproved by the very documents he put before the court.

The defendants did not dispute nor deny the following:

(i) the defendants agreed, by the said deed of forbearance and indemnity dated 16 January 1989, to indemnify the plaintiff "against all loss(es) damage actions claims or demands howsoever arising in the event that the 1st defendant (should) fail to repay all monies due the Chung Khiaw Bank Limited and in consequence thereof the said (lots) foreclosed and forfeited",

(ii) the 1st defendant failed to repay the said loan,

(iii) the plaintiff paid RM750,000 to the chargee bank to avoid the public auction of the said lots (iii) that RM600,000 was credited into the 1st defendant's overdraft account whilst the balance RM150,000 was pledged to the chargee bank, by way of a fixed deposit, as the agreed security for the remaining sum outstanding to the chargee bank,

(iv) the chargee bank returned RM141,024.31 to the plaintiff.

The 2nd defendant exhibited the statements of the 1st defendant' bank account 241-303-778-8 (account) for the months October 1994 to February 1995 (encl. 15 exh. E); those bank statements expressed undoubtedly the following:

(a) on 31 October 1994, the said account was overdrawn in the sum of RM784,963.78,

(b) on 26 November 1994, RM600,000 was paid into the said account,

(c) on 30 November 1994, the said account was overdrawn in the sum of RM190,637.03,

(d) on 31 December 1994, the said account was overdrawn in the sum of RM192,578.66, it being the RM190,637.03 due on 30 November 1994 plus the interests (RM1,591.70) for the month of December 1994,

(e) on 31 January 1995, the said account was overdrawn in the sum of RM194,214.81, it being the RM192,578.66 due on 31 December 1994 plus the interests (RM1,636.15) for the month of January 1995,

(f) on 28 February 1995, a sum of RM2,258.18 was in the credit of the said account, it being the RM194,214.81 due on 31 January 1995 plus the interests (RM527.01) for the month of February 1995 less three payments totaling RM197,000.

So, those three payments totaling RM197,000 were credited, indeed in February 1995, when it was paid into the account. There is just no arguable case it was not so credited.

There is also no arguable case, on the undisputed material, that the judgment sum was in excess of the debt. The plaintiff paid RM600,000 into the said account and deposited RM150,000 as security to the chargee bank for the remaining sum outstanding to the chargee bank. A sum of RM141,024.31 was returned to the plaintiff. It does not take much, since a simple calculation will do, to conclude that the plaintiff suffered a loss of RM608,975.69.

There was no defence on the merits. The default judgment, with respect to the learned SAR, should not have been set aside as the undisputed and undenied facts disproved of the defence. There were no facts which made it reasonable that the defendants should be allowed to raise the stated defence.

Accordingly, putting it where it should have been, the plaintiff's appeal is allowed with costs; the order setting aside the default judgment is set aside and the default judgment is hereby restored.

Reported by Michele Saw